Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| MARITIME COMMUNICATIONS/ | ) | WT Docket No. 13-85 |
| LAND MOBILE, LLC, DIP ("MCLM") | ) | FCC File No. 0005552500 |
| Application to Assign Licenses to | ) | |
| Choctaw Holdings, LLC | ) | |
| | ) | |
| MCLM Applications to Modify and to | ) | FCC File Nos. 0004153701 |
| Partially Assign License for Station WQGF318 | ) | and 0004144435 |
| to Southern California Regional Rail Authority | ) | |
| | ) | |
| Application for New Automated Maritime | ) | FCC File No. 0002303355 |
| Telecommunications System Stations | ) | |
| | ) | |
| Order to Show Cause, Hearing Designation | ) | EB Docket No. 11-71 |
| Order, and Notice of Opportunity for Hearing | ) | File No. EB-09-IH-1751 |
| | ) | FCC File Nos. 0004030479, 0004144435, |
| | ) | 0004193028, 0004193328, 0004354053, |
| | ) | 0004309872, 0004310060, 0004314903, |
| | ) | 0004315013, 0004430505, 00044317199, |
| | ) | 0004419431, 0004422320, 0004422329, |
| | ) | 0004507921, 0004153701, 0004526264, |
| | ) | 0004636537, and 0004604962 |
| | ) | |

PETITION FOR RECONSIDERATION OF WARREN HAVENS

OF FCC 16-172

To: The Secretary
Attn.: The Commission:

Warren Havens, and
Polaris PNT PBC
2649 Benvenue Avenue
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(510) 914 0910

January 17, 2017

## PREFACE AND PROCEDURAL MATTERS

This filing addresses the FCC order, FCC 16-172 (the subject "Order" or "decision") regarding Maritime Communications / Land Mobile LLC, DIP and its alleged chapter-11 successor and current co-controller, Choctaw (*together* herein, "MCLM" or "Maritime").

Two Havens Petitions. This Petition for Reconsideration by Warren Havens ("Havens")[1] ("Petition-2") is submitted concurrently with the Havens Petition for Reconsideration on New Facts ("Petition 1"). Havens understands that a petition for reconsideration on new facts will be processed and determined first, prior to a petition regarding a FCC decision based upon existing facts considered in the decision (or submitted in pleadings underlying the decision), and that until the petition on new facts is determined, parties maintain rights to submit, or amend, a petition on existing facts. In accord, Havens asserts and reserves rights to challenge the subject Order on existing facts after a decision on Petition-1.

This Petition-2. However, out of an abundance of caution, Havens also submits at this time this Petition-2 based on said existing facts on a provisional basis, reserving the right indicated above to amend this Petition-2. In this regard, a detailed Table of Contents ("TOC") is provided below to outline the issues in this Petition 2 for the amendment and completion indicated above. The TOC by itself substantially submits these issues in this filing. In this provisional Petition-2, many of the core issues and arguments are presented, but in order to

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[1] Both Petition-1 and Petition-2 are submitted by Havens individually, and not in the name of or for any other party or entity. Havens has rights to submit these as an individual party in the underlying FCC proceedings as the Commission has determined, including in the subject Order. These filings are also consistent with the proceeding in the California court regarding the Receivership of Susan Uecker. Related to the Receivership, the Wireless Bureau granted the application of Receiver Uecker for retroactive transfer of control in early 2016, which is subject to a petition for reconsideration executed by Havens, not opposed by the Receiver, that is still pending. The Receivership is based upon a decision by FCC ALJ Richard Sippel that is on appeal by Havens. In relation to this history, Havens reserves all rights, including in all of the subject FCC proceedings, including with regard to prejudice caused by the FCC actions, and timing of his challenges to FCC actions.

present a simpler submission for this provisional purpose, these are not submitted underneath the TOC subsections but in one section called, in the text below, "Substance" following the "Introduction and Summary."

In addition, as Appendix 2, Havens includes a document with a presentation of law relevant to the positions submitted herein. Havens submits that the authorities and conclusions in Appendix 2 relevant to this Petition-2 are well established.

Polaris. This filing is also submitted by Havens for Polaris PNT PBC, a Delaware Public Benefit Corporation, controlled by Havens. Havens has assigned certain rights and assets to Polaris to enable it to pursue wireless in the public benefit and for commercial gain.

Procedure. This Petition-2 along with Petition-1 are submitted and qualify under FCC rule § 1.106 including subsections (k)(3), (b)(2), and (c)(2), as well as under 47 USC §§ 405, and 309(d), (e), (i) and (j) of the Communications Act, and under the Fifth Amendment to the US Constitution regarding rights of Due Process. In addition, these two Petitions are submitted under the FCC open docket, 13-85, created to take public comments on the subject special relief requests of MCLM including under the so-called "Second Thursday" "doctrine."

Errors and Relief. The fundamental errors in the Order, and related relief sought, include that the Order (1) violates Due Process rights under the Fifth Amendment and thus should be found void, (2) violates related process rights under the APA and thus should be found void, (3) violates requirements in sections of the Communications Act, which cannot be waived, and thus should be reversed, (4) violates the Commission's rules under those Act sections and should be reversed, (5) is abuse of discretion, inequitable and irrational, and should be reversed, and (6) fails to consider the facts and arguments presented by Havens, and must be reconsidered and re-decided after proper consideration. (Again, Havens asserts that the new facts in Petition-1 should first be considered.)

Alternative Relief. Also, consistent with the meeting between Havens and Wireless Bureau staff in 2016,[2] and FCC rule § 1.106(d)(1)[3] Havens and Polaris intent to submit to the FCC and parties in interest in this matter, a proposal for alternative relief to the relief sought in Petition-1 and Petition-2.

Request to Accept. A request to accept is submitted in a section below, preceding the Conclusions.

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[2] See report of meeting on or about 9-19-16, submitted by Havens under .

[3] §1.106(d)(1) includes: "The petition… may contain alternative requests."

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(3) The Order's finding that these MCLM violations are not major and granting *sua sponte* relief, constitutes an *ultra vires* rule change or *ultra vires* interpretive rule that is void, and is apparently devised to improperly protect the FCC's inclusion of this *ultra vires* rule in iyd instructions in all auctions following the subject AMTS auction 61, where this void rule change or interpretation was unlawfully commenced for MCLM.

C. AFTER A DELAY OF OVER NINE YEARS IN DECIDNG ON THE HAVENS 2007 APPLICATION FOR REVIEW, THIS ORDER STILL AVOIDS THIS THRESHOLD VOID *AB-INTIO* FIRST ISSUE. THE EXTREME PREJUDICE CAUSED CREATES A FURTHER REASON FOR THE RELIEF SOUGHT HEREIN.

6. THE DECISION UNLAWFULLY EXPANDS AND APPLIES THE SO-CALLED "SECOND THURSDAY" "DOCTRINE" TO LICENSES OBTAINED IN VIOLATION OF CONGRESS'S AUCTION AND SMALL-COMPANY MANDATES IN SECTION 309(J) OF THE COMMUNICATIONS ACT AND IMPLEMENTING RULES

A. THE FCC LACKS AUTHORITY TO ACT CONTRARY TO CONGRESSIONAL MANDATES, INCLUDING IN DESCIONS INVOLVIONG "SECOND THURSDAY" RELIEF.

B. THE ORDER IS CONTARY TO CONGRESS'S AUCTION AND SMALL-COMPANY MANDATES IN SECTION 309(J) OF THE COMMUNICATIONS ACT AND IMPLEMENTING RULES

7. THE DECISION UNLAWFULLY EXPANDS AND APPLIES THE SO-CALLED "SECOND THURSDAY" "DOCTRINE" IN VIOLATION OF FIFTH AMENDMENT PROPERTY AND DUE PROCESS RIGHTS AND DC CIRCUIT COURT PRECEDENTS

A. THE HAVENS 2007 APPLICATOIN FOR REVIEW DEMONSRATED FIFTH AMENDMENT PROPERTY AND DUE PROCESS RIGHTS THAT ARE VIOATED BY THE ORDER.

B. CONTROLLING DC CIRCUIT COURT PRECEDENTS REQUIRE REVESAL OF THE ORDER UNDER THE FIFTH AMENDMENT PROPERTY AND DUE PROCESS RIGHTS.

C. CLAIMS OF RIGHTS UNDER THE CONSTITUTION GENERALLY CAN BE RAISED AT ANY TIME, AND IN THIS CASE ARE TIMELY RAIESD.

8. THE ORDER UNLAWFULLY EXPANDS AND APPLIES THE SO-CALLED "SECOND THURSDAY" "DOCTRINE" TO GRANT *SUA SPONTE* RELIEF TO MCLM THAT ADMITTED TO DISQUALIFYING FRAUD AND GROSS NEGIGENCE IN PROCURING AND KEEPING BOTH GEOGRAPHIC AND SITE-BASED LICENSES.

A. THE "SECOND THURSDAY" DOCTRINE DOES NOT ALLOW *SUA*

*SPONTE* RELIEF OF THIS KIND, NOR DO THE FCC WAIVER STANDARDS. DISQUALIFYING ADMISSIONS CANNOT BE WAIVED OR IGNORED UNDER "SECOND THURSDAY" PROCEDURE TO CANCEL THE SUBJECT EVIDENTIARY HEARING.

B. GEOGRAPHIC LICENSES.

C. SITE BASED LICENSES.

9. THE ORDER UNLAWFULLY EXPANDS AND APPLIES "SECOND THURSDAY" "DOCTRINE" IN PROVIDING AN UNJUST WINDFALL OF LICENSES WORTH AN ORDER OF MAGNTUDE GREATER THAN THE ALLGED "INNOCENT CREDITOR" DEBT.

A. EVIDENCE OF THE VALUE OF THE LICENSES.

B. EVIDENCE OF THE LEVEL OF ALLEGED INNOCENT CREDITOR DEBT.

10. THE ORDER DETERMINED DECISIONNAL FACTS WITHOUT SOUND BASIS, AVOIDING THE EVIDENTIARY HEARING UNDER THE OSC-HDO FCC 11-64 IN DOCKET 11-71.

11. THE ORDER IS DEFECTIVE SINCE THE IT DID NOT WEIGH THE EXTENT OF THE WRONGOING AGAINST THE EXTENT OF THE RELIEF GRANTED, AND PROCEEDINGS TO DETERMINE THE EXTENT OF THE WRONGDOING ARE STILL ONGOING, AND THE MCLM SWORN ADMISSION OF DESTRUCTION OF MATERIAL EVIDENCE IS TO THIS DAY IGNORED IN DOCKET 11-71 AND OTHERWISE BY THE FCC.

12. THE SELF-SERVED FACTS PRESENTED BY MCLM AND CHOCTAW TO PURPORTEDLY QUALIFY FOR "SECOND THURSDAY" RELIEF AVOIDING COMPLETION OF THE EVIDENTIARY HEARING UNDER THE OSC-HDO FCC 11-71, IN DOCKET 11-71 ARE DEFICIENT.

13. OTHER ERRORS.

A. DONALD DEPRIEST, OR THE DEPRIESTS, STILL IMPERMISSIBLY RECEIVE MAJOR BENEFITS BY THIS DECISION UNDER EVIDENCE PRESENTED BY HAVENS, AVOIDED IN THE ORDER.

B. IN THE HEARING PROCEEDING 11-71, CHOCTAW ENTERED THE HEARING, WITH ALJ SIPPEL'S APPROVAL, SOON AFTER SUBMISSION OF THE FIRST "SECOND THURSDAY" RELIEF REQUEST, BUT INSTEAD OF BEING SUBJECT TO DISCOVERY THAT WAS PROPOUNDED INCLUDINNG AS TO ALLEGED INNOCENT CREDITORS AND DEBT LEVELS, IT WITHDRAW FROM THE HEARING, AND THUS AVOIDED COMPETENT FACT FINDING AND DECISIONS ON ITS ALLEGED FACTS OF DECISIONAL IMPORTANCE IN ITS FIRST "SECOND THURSDAY" REQUEST, AND ITS SECOND REQUEST SUBMITTED BY ITS PETITION FOR RECONSIDERATION SUBSTANTIALLY GRANTED IN THE ORDER.

C. VIOLATIONS OF FOIA AND EX PARTE RULES UNDERLYING THE ORDER, AND THESE FOIA MATTERS ARE STILL PENDING, SOME BEFORE FCC AND ALL WITHIN THE FOIA COURT-APPEAL TIME LIMITS. USE OF FOIA IS CALLED FOR IN FCC FORMAL HEARING RULES, AND IN THIS CASE, HAVENS FOIA ACTIONS WERE UNLAWULLY DELAYED AND FRUSTRATED, AND PARTLY ADMITTED BY THE FULL COMMISSION. THIS ALSO SUPPORTS GRANT OF RELIEF.

D. HAVENS WAS SUBJECT TO PREJUDICIAL DISCRIMINATORY ACTION IN THE UNDERLYING PROCEEDINGS, AND EQUITABLE RELIEF SHOULD BE GRANTED. THE ORDER ERRS IN SUMARILY ASSERTING OTHERWISE.

E. MCLM CHEATED IN AUCTION 61 NOT ONLY BY USING FRAUDULENT BIDDING CREDITS AND CERTIFICATIONS, BUT ALSO BY ASSERTING INVALID TERMINATED SITE-BASED LICENSES NATIONWIDE. SEE ALSO HAVENS PEITTION-2 IN THIS REGARD.

14. CONCLUSIONS

## INTRODUCTION AND SUMMARY AND FAILURE TO ADDRESS

The descriptive section headings in the table of contents, above, provides a summary. The following is in addition.

Initially, as shown in Appendix 1 hereto, the Order erred in failing to address many of the core facts and issues of law raised in the underlying Havens pleadings, and avoids some pleadings entirely. The Order errors in this regard and the matters at issue should be reconsidered and re-determined on this basis. The larger error that, in part, explains this failure to address, is the failure to hold and complete a formal hearing as discussed below.

Under the Communications Act, Congress requires that the FCC shall not issue a license unless the applicant is qualified. §309(i). Where, as here with Auction 61, (i) the FCC recognized, on an extensive record including admissions,[4] substantial doubts or questions exist as to the qualification of the applicant, MCLM, to have bid for and to have obtained the subject

[4] The OSC-HDO FCC 11-64 recognized that Havens' challenges to the MCLM short and long forms in Auction 61 did pose §309(i) qualification doubts, and thus, that the Wireless Bureau should not have granted the subject Licenses in the first place.

licenses, and (ii) there were competing bidders controlled by Havens who would have won the Licenses but for the disqualifying actions of MCLM in question-- Congress requires a hearing (a) to resolve the MCLM qualification issue and (b) to allow the competitor its Fifth Amendment and APA[5] Due Process rights that Congress established in §309(d), (e), (j). To meet these requirements, the subject Order should be reversed and these actions taken.

Here, while very late (see preceding footnote) the Commission began hearings into the qualifications of the licensee, MCLM, in docket 11-71. That hearing, which is still, close to 6 years later, only partly-completed, revealed in 2014 by the persistence of Havens (acting in that hearing as co-prosecutor with the Enforcement Bureau) that the licensee mislead the Commission as to material facts regarding most of its AMTS site-based licenses and stations nationwide, which in turn led to the licensee having to give up those licenses, despite having argued for years that it was entitled to keep them, artificially dragging on this hearing for years.[6]

These are the licenses and stations MCLM asserted as valid before and during Auction 61, that it would keep to block any other bidders, if successful, from using the geographic spectrum in these major parts of the nation, thus artificially reducing Havens ability to raise funds to compete in this auction against MCLM. To this day, in docket 11-71, there has been no determinations with proof, and no negative inferences applied to MCLM for MCLM's lack of proof, of which stations were ever constructed at all, and of those, when and how any constructed stations that MCLM eventually admitted were abandoned and auto-terminated, were in fact abandoned (de-constructed with services stopped) and thus auto-terminated. Those actual termination dates and circumstances are relevant to the degree of wrongdoing by MCLM with its site-based stations and licenses, and the degree of MCLM cheating in the foundations of Auction

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[5] The Federal Administrative Procedures Act ("APA").

[6] It clearly was MCLM, not Havens, that acted badly in this hearing, which ALJ Sippel, for reasons still to be revealed, accommodated without sanction.

61 (what geographic spectrum is in fact for sale, apart from the spectrum taken up by *valid* site-based stations and licenses) that involve actual dates and circumstances, for reasons just indicated.

In any Second Thursday relief determination, the FCC must weigh the degree of wrongdoing against the assumed equitable rights of "innocent creditors." This cannot be done yet, for reasons just noted above—and further shown in Havens Petition-1.[7] In addition, in the Order, the Commission did not employ and demonstrate any such weighting, and for each of these reason alone, the Order must be reversed.

The MCLM hearing was discontinued before the other half of the inquiry, regarding the geographic licenses and Auction 61, was hardly commenced. That inquiry turns around whether Maritime had committed fraud in that auction, then covered that up in FCC investigations and in the proceedings involving the Havens challenges of MCLM. Before resolving that issue as required by §309 (d), (e), (i), and (j) the FCC has now, by the Order, terminated the hearing as to the geographic licenses (and limited it as to the site-based licenses).[8]

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[7] MCLM in its applications to renew and get a construction extension for the subject geographic AMTS licenses, submitted in late December 2016, after this Order was issued, asserts (among other things) that its terminated site-based licenses were in actual operation for long periods of time after it procured by false bidding credits the geographic licenses, and those alleged operations under those site-based licenses call signs, should be deemed to count as operations under the separate geographic licenses. I alleged that is a fraudulent assertion, and it is clear that MCLM had in proceeding 11-71 produced no proof of that assertion, but instead submitted to the Wireless Bureau a sworn Declaration that its evidence of that was destroyed, which itself a violation of FCC rules and 18 USC §1519 of the US criminal code. A hearing should be held on this and other issues of wrongdoing raised by the MCLM claims in these renewal and extension applications (see Petition-1), to determine the level of wrongdoing by MCLM from Auction 61 to this day, prior to any determination of relief under "Second Thursday" or any other basis.

[8] But for certain matters still reserved for 11-71, apart from "qualification" issues, that deal with construction and operation. But the latter are core to the "qualification" issues, as indicated above and in Petition-1.

The Order means, unlawfully, that the FCC is free to ignore the question of whether Maritime was ever qualified to have obtained the licenses in the first palace. Instead, the FCC wrongly concluded that an inapplicable doctrine favored allowing Maritime to assign the licenses to a third party, Choctaw, on the basis that the third party includes or speaks for purportedly "innocent" creditors. In fact, the records show that these "creditors" funded MCLM from its start with awareness of the wrongdoings shown by sound evidence presented by Havens from the time of Auction 61 and ever since: they invested in and were the engine behind the wrongdoings in large part admitted to by MCLM at the start of their investments. The FCC erred in the Order by avoiding sound evidence of this presented by Havens.

Further, the FCC has never, in 11-71 or otherwise, provided the hearing required under the Due Process rights of the lawful bidders that competed against MCLM in Auction 61 and but for its fraud in that auction, would have won the licenses issued to MCLM. 11-71 did not provide that hearing, for reasons indicated above. Now, the Order cuts that off. That is against the Communications Act and US Supreme Court precedents, discussed below and in Appendix 2 hereto.

The Communications Act is structured to require that the FCC issue licenses only to "qualified" parties. Similarly, the Act is designed to ensure that license auctions are conducted lawfully, and are not infected with fraudulent behavior. The Act, the Commission's rules, the APA and common sense all say that the FCC cannot allow a license to keep (much less sell off) its licenses, where credible allegations exist that the party was never "qualified" to have obtained the licenses in the first place.

In the subject MCLM Order, the FCC proposes to turn those standards on their head by holding that a not-qualified party may hold and assign the licenses to third parties, provided that the assignee alleges, outside of a hearing, that it has not engaged in the fraud. This is irrational, and avoids all issues of whether issuance of the licenses complied with law. This is like the

government suggesting that the loot of a robber becomes legitimate by the robber handing it to a third party so long as that party did not aid or abet the robbery, and where the lawful claimant to the loot loses its claim. As applied here, that violates the letter and the spirit of both the Communications Act and the Bankruptcy Code, as well as common sense.

SUBSTANCE
(See Preface)

In essence, the "Second Thursday" "doctrine" is an FCC policy designed to protect the public interest of legitimate innocent creditors and allows the Commission to approve a sale and assignment of a bankrupt's license in a transaction that will not unduly interfere with the FCC mandate to ensure that FCC licenses are used and assigned consistently with the Communications Act. Here, however, the only assignment possible under FCC rules based on the mandates in the Communications Act including 47 USC ¶309 (d), (e), (i) and (j) is to the lawful high bidders in Auction 61 (among the "Skytel" companies described in the Order, controlled by Havens as described in the Order).

This is the seminal defect in the series of FCC actions commencing with acceptance of clearly false and fraudulent MCLM short-form to enter Auction 61 and its long-form to obtain the licenses won with phony bidding credits (preceded by likewise false and fraudulent MCLM assertion of valid site-based AMTS stations nationwide, to drive off auction competitors). This has polluted all auctions since Auction 61 in 2005, and has ended up in this unlawful Order in which the Commission still hardly addresses the facts and law Havens has presented for over a decade, and what is addressed avoids the most important and compelling facts and law presented.

In short, the FCC may not lawfully provide "Second Thursday" (or "ST") or any relief, as it does here, to reach back a decade and revive and launder licenses that are void *ab initio* due to

violation of core, qualifying FCC auction rules that were promulgated under Congressional mandate for small company incentives in Comm Act sec 309(j)[9] under the facts in the record.

Facts of violations sufficient for finding the MCLM geographic licenses void *ab initio* have been admitted to by MCLM, and to that extent, no further hearing is needed. However, if the FCC disagrees, then a formal hearing must be completed as argued herein.

This FCC decision is, at its core, a violation of Due Process under APA and Fifth Amendment under well-established case law including DC Circuit Court cases on federal auctions, *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1120 (D.C. Cir. 1969); *McKay v. Wahlenmaier,* 226 F.2d 35, 41 (D.C. Cir. 1955); *and Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 161 (D.C. Cir. 2003), which, in turn are supported by US Supreme Court precedents cited by Havens in the pleadings in this matter, including *WOKO* and *Ashbacker*, and by numerous additional US Supreme Court and DC Circuit Court precedents discussed in some depth in the legal memo provided in Appendix 2 hereto.

The Communications Act § 309(d) provides the right to competing license applicants to challenge (as does the US Supreme Court *Ashbacker* case, cited by FCC to Congress in its 1997 report to Congress on Auctions) an auction high bidder by a petition to deny its long form and license grants. Where Congress establishes such a right to protect an economic interest, it is a

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[9] From In the Matter of Updating Part 1 Competitive Bidding Rules…, FCC 14-146, 29 FCC Rcd 12426 (2014) (footnotes deleted, underlining added):

> 4. In establishing the Commission's auction authority, Congress …[by] Section 309(j)(4)(D) of the Communications Act ("the Act") requires that when the Commission prescribes regulations in designing systems of competitive bidding, it shall "ensure that small businesses…are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of . . . bidding preferences." In addition, the statute directs that in designing such systems of competitive bidding, the Commission shall seek to promote "economic opportunity and competition . . . by … disseminating licenses among a wide variety of applicants, including small businesses…." At the same time, the Act requires the Commission to "prevent unjust enrichment as a result of the methods employed to issue licenses . . . ."

Due Process right to protect against unjust deprivation of property under the Fifth Amendment and the APA section on adjudication. FCC licenses are rights and all rights are a type of property (see, e.g., the US Supreme Court decision in the *Nextwave* bankruptcy case: bankruptcy deals with property of the Debtor, etc.)

A decision that violates Constitutionally protected Due Process is void, not or not simply an abuse of discretion or error. This applies here. [10] Claims under the Constitution and its Amendments generally can be raised at any time, and are in any case timely raised by Havens in this matter.

The DC Circuit Court, in a case this Order cites to, *La Rose* (which was soon after and is based on the original "Second Thursday" decision), points to this issue: a limitation of Second Thursday relief is that it cannot undercut rights of other licensees under the Communications Act and Due Process.[11] The US Supreme Court in the FCC cases *WOKO* and *Ashbacker* support the preceding.

"Second Thursday" ("ST") is not a statute or rule but is a general, vague and evolving "doctrine" as the DC Circuit Court explained in cases following the initial Second Thursday case. ST appears to be a type of "interpretive rule" in administrative law, under alleged FCC "ancillary authority," that attempts to interpret permissible flexibility in assumed vague langue of Communications Act sections 310(d) and 312 and related FCC rules. See Appendix 2 as to limits of "interpretive rules" and FCC "ancillary authority." [12] The FCC in this Order exceeds those limits by directly undercutting mandates of Congress to hold and complete a hearing under 47 USC §§ 309(d),(e), (i), and (j) on the MCLM Auction 87 participation and licensing, and the

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[10] A challenge to a decision as unconstitutional can be made at any time.

[11] In addition, "Second Thursday" relief cases are premised in part on the licensee in bankruptcy being managed by a bankruptcy trustee or receiver and not, as in this MCLM case, by the entity and its management that is accused of the wrongdoing.

[12] Courts give less *Chevron* deference to interpretive rules.

lawful high bids of two LLCs Havens controlled. These statutes are not vague, on the matters at issue here, and thus cannot be lawfully subject to any such interpretive rule. There is nothing in "Second Thursday" "doctrine" that allows the FCC to avoid and violate these Congressional mandates to benefit assumed innocent creditors under bankruptcy law (even if, unlike in this case, there was credible proof of the alleged innocent creditors, and their level of debt).

ST only provides that, in consideration of bankruptcy law, in a circumstance where a licensee is in a BK and demonstrates[13] "innocent creditors,"[14] the FCC may weigh the degree of disqualifying wrongdoing under the Communications Act (including § 312) (once substantially but not finally determined or admitted to)[15] against benefits to the "innocent creditors" by special waiver of the §310(d) assignment qualification standards and determinations (which involve the "*Jefferson Radio*" doctrine in such circumstance).

However, ST does not and cannot allow the FCC, as it does in this Order, to abrogate its direct obligations imposed by Congress under the clear relevant language of the Communications

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[13] Via a BK trustee or receiver, or other neutral. However, MCLM chose to not to use any such neutral. Instead, MLM continued with the management subject of the 312 disqualification charges and (see admissions), and Choctaw then hired the CEO of MCLM, John Reardon, to be its senior managing person. Reardon was CEO and chief architect of MCLM from its start.

[14] (a) However, this FCC Decision suggests that the BK court determined, for the FCC, that the alleged creditors are innocent of the subject FCC wrongdoing. But the BK court started it could not and would not do so.

(b) Moreover, the DC Cir Ct ruled in the *Nextwave* case (as argued by by the FCC) that were the licensee in BK has creditors that *knew* of the licensee's obligations and risk of failures under FCC law, they cannot assert Second Thursday or similar relief. That is in the DC Circuit Court decision. The FCC, US DOJ and US Solicitor presented this to the US Supreme Court as part of their case. They lost but not on this point. On this point the DC Cir decision stands.

(c) In addition, MCLM asserted in 11-71, soon before admitting to abandonment and permanent discontinuance of over 80% of its site based AMTS stations and licenses, that it consulted with and got approval of its creditors (now part of Choctaw) for this abandonment- up to 2.5 years before the date of this MCLM admission. That means these creditors are not innocent but took part in this concealment of bogus stations, in the attempt to keep the terminated stations and defraud the FCC, Judge Sippel, the Enforcement Bureau and Havens.

[15] However, MCLM has admitted to disqualifying facts.

Act including §§ 309(d), (e), (i) and (j) regarding the Fifth Amendment and APA Due Process rights involved.

*Doing this undermines all FCC auctions since the subject Auction 61 in 2015*-- shown in all FCC pre-auction "procedures" Public Notices (and other FCC instructions) in which the improper decision to allow MCLM to uses falsely obtained bidding credits (admitted to even right after the auction) to win over the two lawful high bidders. These Public Notices and instructions included an *ultra vires* "interpretive rule" that turned on its head the letter and spirit of the clear FCC auction rules involved. Under administrative law, is it impermissible for any interpretive law to undermine and change a clear rule, especially when the rule was mandated by a statute as in this case (by 309(j)). Such *ultra vires* actions are void. See authorities and discussion in Appendix 2.

An example is the AWS-3 auction and the Dish Networks case. But for the FCC decision to grant and sustain the grant of the MCLM licenses from Auction 61, in the face of the clear violations, the FCC instructive materials for the AWS-3 auction would not have had this *ultra vires* interpretive rule that caused or may have caused the Dish to impermissibly bid, according to post-auction FCC determinations: If the FCC is right, then Dish, by undisclosed affiliates and attributable gross revenues, applied for, got and used to outbid others undeserved bidding credits -- like MCLM in Auction 61.

The FCC appears to be improperly protecting this *ultra vires* interpretive rule that has polluted all auctions since (and including) Auction 61 by the subject Order and spuriously applies and extends the Second Thursday doctrine. That would be a further impermissible action. Instead, the FCC should reverse this Order, and issue a retraction of the *ultra vires* interpretive rule that has polluted these auctions and will continue to pollute auctions until retracted.

Continuing with this Order, and the underlying *ultra vires* interpretive rule, will further undermine future auctions, and FCC integrity. That should be a concern to all commercial licensees and applicants who may bid in future auctions, or who may buy licenses in the secondary market that are auctioned in the future. It should also be a grave concern to Congress and the public that depends on FCC integrity and efficiency in licensing.

SUBTANCE – OTHER
(See Preface)

(1) The Order and all the underlying proceedings are fatally tainted by MCLM's admitted concealment and destruction of its records (an 18 USC §1519 criminal offense) as to all of its site-based licenses construction and operation (and lack thereof). Havens presented this in his pleadings in this underlying matter. This is the primary means by which MCLM won Auction 61 licenses, not the cash bid and paid. MCLM stated to the FCC and other bidders that all their site based AMTS licenses nationwide were valid but that was fraud, and the fraud was covered up by this evidence spoliation.

(2) The Order did not address Havens relevant past showings that the Depriests are still getting multiple million dollars in benefits, and that the or a chief officer in Mobex, then in MCLM, then in Choctaw, John Readon, who is among the wrongdoers by the evidence, is also getting substantial benefits. The past showings included that the Depriest judgment debt owed to Mr. Phillips was shifted to MCLM.

(3) The Order did not address various Havens showing regarding the nature of Choctaw (conversion of alleged "innocent creditor" debt to equity—this is not a license sale, etc.) in the Bankruptcy Court's approved Chapter 11 Plan. And the Plan does not require Choctaw to sell licenses, and use proceeds to pay creditors. Also, as noted in Petition-1, Choctaw intervened in proceeding 11-71 but when faced with discovery demands, left the hearing and was improperly permitted to not be subject to any formal hearing process. The very hearing in which MCLM-

Choctaw could attempt to show evidence of "innocent creditors" and other matters to qualify for Second Thursday relief, was fully avoided. Determination of "innocence" under Second Thursday is not a function of bankruptcy law and the Bankruptcy Court, but of FCC law and proper FCC fact finding. However, the Order did not show this was properly done, or that it the FCC considered the evidence presented by Havens on this topic.

(4) "Innocent" creditors were never determined by the BK court as this Order suggests. The court, instead, said it cannot do so since "innocence" under Second Thursday is in relation to wrongdoing under FCC law and the BK court has no jurisdiction or competence in FCC law and determinations. As for the FCC, from the Order, it improperly accepted untested in inadequately tested assertions of MCLM-Choctaw without using the hearing process already set up, 11-71, or other process to competently determine this. Also, the FCC avoided the sound evidence Havens presented that the creditors were aware of and invested in the wrongdoing. That is how MCLM was funded from the start and sustained all along. See also Petition-2.

(5) This Order provides unjust massive windfalls to Choctaw, even if it and its members are deemed innocent creditors, and that is prohibited by the principals of Second Thursday.

(6) The FCC in this Order failed to address most of the facts and arguments Havens presented, as noted above.

As explained in the preface, this is a conditional filing to be amended.

## REQUEST TO ACCEPT

The Request to Accept included in Petition-1 is referenced and incorporated herein.

## CONCLUSIONS

For reasons given, the Order should be reconsidered and the relief requested herein should be granted. Also, the Conclusions in Petition-1 are referenced and incorporated herein.

Respectfully submitted,

/s/
Warren Havens

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Declaration

I declare under penalty of perjury that the facts presented in this filing, known to me, are true and correct.

/s/
Warren Havens
January 17, 2017

Certificate of Service

A certificate of service will be separately filed.